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IN THE

# Supreme Court of the United States

**October Term, 1965**

**No. 472**

REMO J. ADDABBO, individually, etc., and others, etc.,
*Petitioners,*

*against*

JAMES B. DONOVAN and others, constituting the Board of Education of the City of New York, and others, etc.,
*Respondents.*

## BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

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### Statement

Petitioners seek a writ of certiorari to review a judgment of the Court of Appeals of the State of New York, entered May 27, 1965, affirming an order of the Supreme Court of New York, Appellate Division, Second Department, entered January 11, 1965, which affirmed a judgment of the Supreme Court of New York, Queens County, entered July 16, 1964, which upheld a determination of the Board of Education of the City of New York pairing two adjacent elementary schools (Public Schools 149 and 92) in the

Borough of Queens, City of New York, under a common attendance area zone whereby, commencing in September, 1964, (1) kindergarten children attend Public School 149 or Public School 92 based on the former attendance zones for those schools, and (2) all children in the common zone who are in grades 1-2 attend P. S. 92 and those in grades 3-6 attend P. S. 149.

## Opinions Below

The opinion of the Supreme Court, Queens County (MARGETT, J.), is reported in 43 Misc 2d 621, 251 N. Y. S. 2d 856. The opinions of the Appellate Division of the Supreme Court, Second Department, are reported in 22 A D 2d 383, 256 N. Y. S. 2d 178. The opinion of the New York Court of Appeals is reported in 16 N Y 2d 619, 209 N. E. 2d 112.

## Question Presented

Are the petitioners' rights under the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution violated by the establishment of a common attendance area zone for two adjacent elementary schools whereby the petitioners' children and all other children residing in the common attendance area zone are admitted to such schools solely on the basis of their attained school grade, without regard to their race, color, creed or national origin?

## Facts

### (1)

Public Schools 149 and 92 are adjacent elementary schools, and each had classes from kindergarten through the sixth grade. The two schools are only six short blocks apart and had contiguous attendance area zones (Answer, par. "29").

Projected as of September, 1964, P. S. 149 would, under its former single school attendance zoning, have been over-utilized with an enrollment of 1,186 and a capacity of 1,076 pupils; its average class size would have been 36.5 pupils; and it would have had 87.8% white students, 10.7% Negro students and 1.5% Puerto Rican students. Public School 92 would have been utilized 89% with an enrollment of 549 and a capacity of 619 pupils; its average class size would have been 29.2 pupils; and it would have had 98.8% Negro students, .7% Puerto Rican students, and .4% white students (Answer, pars. "31-33"; Exhibit "A" annexed to Affidavit of Halloran and Haft).

As far back as June, 1963, representatives of the Parents Associations of Public Schools 149 and 92 met with representatives of the United Parents Association to consider and study the advisability of a proposal for reorganizing the two schools under a common zone along the lines of the so-called Princeton Plan of school pairings to effectuate better ethnic balances in the two schools as well as other educational benefits and services. By September 5, 1963 this study had progressed to the stage where a meeting was arranged for and held in the office of the Chair-

man of the Board's Committee on Integration. It was the consensus of those present that the proposal warranted further study and consideration both at the parent and community level and by the professional staff of the Board of Education. The proposal continued to be considered and explored by the parents and Parents Associations of the two schools, by the Local Boards for those two schools as well as by the Assistant Superintendents in charge of the schools; the Central Zoning Unit of the Board of Education, and other staff members of the Board (Answer, par. "22").

By December 19, 1963, Miss Mary Halloran, the Assistant Superintendent in charge of P. S. 149 and Mr. Cormac K. Meagher, the Assistant Superintendent in charge of P. S. 92, had prepared and submitted for consideration by the parents and community of the two schools as well as the Board of Education, a proposed plan for reorganization of Public Schools 149 and 92 (Answer, par. "23"; Petition, Exhs. II and III). This proposal for reorganization of the two schools continued to receive long and careful consideration, and on June 3, 1964, the Board of Education adopted a resolution approving, effective September, 1964, the substance of the Assistant Superintendents' plan for reorganization of Public Schools 149 and 92 (Answer to Supplemental Petition, par. "1"; Exhibit VII, attached to Supplemental Petition, p. 11).

**(2)**

The reorganization of Public Schools 149 and 92 provided, effective September, 1964, as follows: (1) Kindergarten pupils continue to attend both schools based on

the former single attendance area zones for the schools; (2) the seven-block area at the extreme western end of the former P. S. 149 zone was rezoned to two neighboring schools within walking distance; (3) the seven block area at the extreme eastern end of the former P. S. 92 zone was rezoned to Public Schools 148 and 89, neighboring schools within walking distance; and (4) the remaining area of the contiguous attendance areas of Public Schools 149 and 92 was established as a community zone with all grades 1-2 children in the common zone attending P. S. 92 and all grades 3-6 children attending P. S. 149 (Answer, par. "35", Exhs. "II", "III", "IV", attached to Answer).

The reorganization of Public Schools 149 and 92 under a community attendance area zone will result in better utilization of both schools, average class sizes in both will be substantially reduced, the ethnic balances in each will be improved, and the quality of education will be otherwise improved in both schools by the addition of educational and professional benefits and services.

Thus, projected as of September, 1964, P. S. 149, which has a capacity of 1076, will have a utilization of 89% with an enrollment of 888 instead of an overutilization of 110% with an enrollment of 1186. P. S. 92, which has a capacity of 619, will have a utilization of 83% with an enrollment of 537 instead of a utilization of 89% and an enrollment of 549. P. S. 149 will have an average class size of 26.6 pupils instead of 36.5, and P. S. 92's average class size will be 25.5 pupils instead of 29.2. The ethnic composition in P. S. 149 will be 74.8% white students, 24.1% Negro students, and 1.1% Puerto Rican students instead of 87.8%

white students, 10.7% Negro students, and 1.5% Puerto Rican students; and P. S. 92 will have 52.3% white students, 46.1% Negro students, and 1.6% Puerto Rican students instead of 98.9% Negro students, .7% Puerto Rican students, and .4% white students. Both schools will have, in addition to their classroom teachers and the other educational and professional positions they now have, the following positions: P. S. 92 will have a physician for 3 additional hours per week, and P. S. 149 will have (1) a corrective reading teacher, (2) a combination science-instrumental music position, (3) a librarian, (4) a programming position, (5) a guidance counselor, (6) a part-time social worker, (7) a part-time psychologist, (8) a psychiatrist on call, and (9) a physician for three additional hours per week. And all first-grade children will receive a full day's instruction of 5 hours per day instead of 4 hours instruction per day (Answer, pars. "36-39"; Exhs. II and III of Petition).

That the reorganization of Public Schools 149 and 92 was the result of long and careful planning directed toward the attainment of maximum benefits for all of the children in the community attendance zone is evident from the following: Kindergarten children residing in the respective former attendance area zones of Public Schools 149 and 92 continue to attend those respective schools because such children only attend school one-half day and it is considered educationally advisable for a child's initial introduction to school to be as close to home as possible (Answer, par. "40"). All grades 1-2 children residing in the common zone of the two schools attend P. S. 92 and all grades 3-6 children in the common zone attend P. S. 149 because

the larger capacity of P. S. 149 can accommodate more grades, and for the further reason that P. S. 149 has a more suitable plant for upper grade children in that it has two gymnasia whereas P. S. 92 has none (Answer, par. "41"). P. S. 92 was modernized with improvements in safety, classroom size, lighting, sanitation, etc., so that both Public Schools 149 and 92 have high physical standards (Answer, par. "42"). A close, continuing administrative harmony will exist between the two schools with resulting transitional benefits for children going from P. S. 92 to P. S. 149 so that it will be as though the children remained in the same school building. The curricula of the two schools will be sequential with the result that the problems ordinarily occurring when a child moves from one school to another will be avoided (Answer, par. "43").

Of the approximate enrollment of 1425 pupils in the two schools all but 29 of the children live within walking distance of either school, and the 29 children, who are in grades 1-2 and live slightly more than a half mile from P. S. 92, will be provided with bus transportation. Attendance at the kindergarten classes in the two schools will be unaffected by the reorganization, and those children in grades 1-2 residing in the former attendance zone of P. S. 92 will be unaffected. Nor will the requirement that children in grades 3-6 attend P. S. 149 affect those residing in the present attendance zone for that school. Some of the children in grades 1-2 who under the former attendance area zones would be required to attend P. S. 149 will be equidistant from or one, two or three blocks closer to P. S. 92, the school they will attend under the reorganization of Public Schools 149 and 92. None of the children will have

to travel more than six short blocks further than formerly, and many will be required to travel less (Answer, par. "44"). None of the petitioners' children will require busing and petitioner Balides' child will, by reason of his residence, not attend P. S. 92 (Affidavit of Kessler; Petition, Exh. "II").

## ARGUMENT

**No substantial federal question is presented by the petition.**

**(1)**

The sole constitutional question presented for the consideration of this Court is whether the petitioners' rights under the Fourteenth Amendment have been violated. That they have not been violated is established by the undisputed fact that any child living in the common attendance area zone of Public Schools 149 and 92 can, without regard to his race, color, creed or national origin, attend the school which accommodates his particular school grade. All children in grades 1-2 in the established common zone can attend P. S. 92 and all children therein in grades 3-6 can attend P. S. 149. Admission to the schools is limited solely by class grade, not race or color. Neither school is limited to any particular race or color, and both schools have been and will be attended by children of both races.

The decision below is not in conflict with any decision of this Court or of lower federal courts. In every case decided by this Court and lower federal courts in this field the constitutional rights of the complainants have been

held to be violated only upon a showing that state action has resulted in the maintenance of racially segregated schools. In the earlier cases, of which *Brown* v. *Board of Education*, 347 U. S. 483 (1954) and *Bolling* v. *Sharpe*, 347 U. S. 497 (1954), are typical, the state action consisted of the enactment of statutes or constitutional provisions which either required or permitted boards of education to operate segregated schools. In the more recent cases, the state action consisted of assignment plans or pupil transfer regulations which had the purpose and effect of separating children in schools according to their race. Typical of such cases are *Griffin* v. *County School Board of Prince Edward County*, 377 U. S. 218 (1964); *Goss* v. *Board of Education of Knoxville, Tenn.*, 373 U. S. 683 (1963); *Green* v. *School Board of Roanoke*, 304 F. 2d 118 (4th Cir., 1962); *Dillard* v. *School Board of City of Charlottesville, Va.*, 308 F. 2d 920 (4th Cir., 1962), cert. den. 374 U. S. 827 (1963); *Taylor* v. *Board of Education of New Rochelle*, 191 F. Supp. 181, affd. 294 F. 2d 36 (2d Cir., 1961), cert. den. 368 U. S. 940 (1961).

Petitioners ignore the rulings in these cases and are content to quote isolated statements in certain opinions without regard to the facts or the determination in each case. Thus, petitioners (p. 5) have quoted certain portions of the text of *Bolling* v. *Sharpe*, *supra*, 347 U. S. 497, 499 and *Goss* v. *Board of Education*, *supra*, 373 U. S. 686, 687, for the obvious purpose of conveying the impression that this Court has held that the mere consideration of color by a state in school matters is *per se* unconstitutional. Petitioners have ignored the fact that in those cases the state action was condemned because the clear purpose and effect

of such action was either to establish or maintain racial discrimination.

Petitioners' reliance on broad general statements without regard to the facts or the courts' holdings emphasizes the wisdom of the caveat expressed on more than one occasion by this Court as to the unreliability of such statements when urged in support of asserted constitutional rights. *Armour & Co.* v. *Wantock,* 323 U. S. 126, 132-133 (1944); *Hughes* v. *Superior Court,* 339 U. S. 460, 469 (1950); *Gomillion* v. *Lightfoot,* 364 U. S. 339, 343-344 (1960).

Petitioners fail to distinguish between discriminatory state action based on race or color and awareness or cognizance of color by the state in its efforts to achieve equality among the races in order to attain an educational benefit for all of the children. The petitioners' children have not been made the objects of racial discrimination for the simple reason that admission to both schools (Public Schools 149 and 92) depends solely on the grade the child has attained and without regard to his race, color or creed. Petitioners invoke the Fourteenth Amendment not as a shield against discriminatory state action but as a sword to compel the respondents to perpetuate racially imbalanced schools. In the first *Brown* decision, 347 U. S. 483, this Court, while holding that the operation of *de jure* segregated public schools is unconstitutional, also condemned as educationally inferior *de facto* segregated schools. This Court quoted with approval the following holding of the Kansas Court in one of the cases decided with *Brown* (347 U. S. at p. 494): "Segregation of white and colored children in public schools has a detrimental effect upon the colored chil-

dren. The impact is greater when it has the sanction of law; * * *." Furthermore, it is the preponderant educational judgment, apart from any legal or constitutional requirement, that the elimination or reduction of racial imbalance in the public schools, insofar as reasonable and feasible, improves the quality of education for all children, not only for those of underprivileged minority groups. The following quotation from the decision by the New Jersey Supreme Court in a recent case, *Moreau* v. *Board of Education of Montclair,* 42 N. J. 237, 200 A. 2d 97, 100 (1964), is particularly appropriate herein:

> "Constitutional color blindness may be wholly apt when the frame of reference is an attack on official efforts toward segregation; it is not generally apt when the attack is on official efforts toward the avoidance of segregation."

Concededly, the furtherance of integration in Public Schools 149 and 92 was one of the primary considerations for the community attendance area zoning of those two nearby schools. And, obviously, the zoning of public schools in order to prevent or eliminate racial imbalance necessarily must involve consideration of racial and ethnic factors in the area being zoned. But zoning based on such considerations does not violate the Fourteenth Amendment. No one's constitutional rights are violated if the zoning does not result in segregation in the public schools and all children residing within the zone and possessing the necessary educational qualifications are admitted to the public schools regardless of their race, color or creed. As was stated in *Lynch* v. *Kenston School District Board of Education,* 229 F. Supp. 740, 744 (Dist. Ct., Ohio, 1964):

"Plaintiffs have a constitutional right not to be objects of racial discrimination, and they can vindicate that right in an action before this Court, but they do not have a constitutional right to attend or to refrain from attending a particular school on the basis of racial considerations when there has been no actual discrimination against them."

*Matter of Balaban* v. *Rubin*, 14 N Y 2d 193 (1964), cert. den. 379 U. S. 881 (1964), is in principle indistinguishable from the case at bar, and the disposition therein should be dispositive of the petitioners' application herein. In *Balaban*, which involved the zoning of a new junior high school, and in the instant case, which involved the common attendance area zoning of two nearby elementary schools, the improvement of ethnic balances in the schools was one of the several criteria employed in the establishment of school attendance zones. In both instances the purpose and effect of the criterion was to reduce or eliminate racial segregation rather than to establish or maintain it. In both cases, all of the children attend integrated schools, without regard to their race, color or creed. Petitioners would invoke the Constitution not to remove or avoid discrimination but rather to establish or perpetuate racial segregation.

(2)

Petitioners have cited (pp. 6-7) authorities to the effect that the establishment of racial quotas is constitutionally repugnant. With this we are in full accord. However, any attempt to introduce such an issue herein is completely without merit. No attempt was made by the respondents

to achieve or thereafter to maintain and preserve the same racial composition of Public Schools 149 and 92. Every child residing in the attendance area goes and will go to the school nearest his home which accommodates his grade, without regard to race or color and without any limitation as to the percentage of pupils of his own or of any other race or color.

**(3)**

Petitioners have quoted (p. 3) the text of Section 401 of the Civil Rights Act of 1964 (42 U. S. C. A. §2000c) for the obvious purpose of conveying the impression that the zoning of Public Schools 149 and 92 violated that statute, and, therefore, warrants the granting of their application for a writ of certiorari. It is significant, however, that apart from quoting the text of the statute, the petition is completely silent on this point. It is clear from a mere reading of the Civil Rights Act of 1964 that that statute has no relevance on this application. The clear intent of Section 401 and the sections which follow it is that no funds and no technical assistance will be given by the United States Commissioner of Education with respect to plans for the assignment of students to public schools in order to overcome racial imbalance. The statute may not be interpreted to mean that such assignment is illegal or that reasonable integration efforts are unlawful. The Congress has determined to limit the grant of United States funds and assistance to the desegregation of *de jure* segregated schools. This does not mean, however, that reasonable attempts to overcome racial imbalance in the public schools are illegal.

**(4)**

Respondents' plan will result in substantial benefits to the children who will attend Public Schools 149 and 92. There is no basis for the petitioners' assertion that the plan is unconstitutional. On the contrary, it is manifest that the zoning of the two schools is a valid and reasonable exercise of the respondents' discretion in the operation of the public school system of the City of New York. There is no warrant for annulling the beneficial action taken by the governmental body charged with the administration of the public schools. Petitioners have failed to demonstrate the existence of a substantial federal question warranting consideration by this Court.

## CONCLUSION

**The petition for a writ of certiorari should be denied.**

September 8, 1965.

Respectfully submitted,

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